DOCKET FILE COPY ORIGINAL

RECEIVED

APR 2 6 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Applications of	)	MM Docket No. 93-94
Scripps Howard Broadcasting Company	)	FCC File No. BRCT-910603KX
For Renewal of License of Station WMAR-TV, Baltimore, Maryland	)	
and	)	
Four Jacks Broadcasting, Inc.	)	FCC File No. BPCT-910903KE
For a Construction Permit For a New Television Facility on Channel 2 in Baltimore, Maryland	)	

TO: The Honorable Richard L. Sippel
Administrative Law Judge

CONSOLIDATED REPLY TO OPPOSITIONS

Table of Contents

No. of Copies rec'd 2+6
List A B C D E

SUMMARY

Nothing in the Oppositions of Four Jacks Broadcasting, Inc. or the Mass Media Bureau contradicts the plain need for Commission

For example, in the renewal contest there can be no potential countervailing public interest benefit of encouraging the initiation of a new service to the community. The net result of a successful renewal challenge is instead necessarily the elimination from the market of an existing voice which was selected by undistorted market forces <u>and</u> the substitution of a voice selected solely by a decision maker who has economic incentives directly contrary to ensuring the best possible service to the community. The expensive comparative renewal process simply cannot rationally be employed to achieve this perverse result.

Separately, <u>WPOW</u> should not be construed to apply here because [illegible] of the spectrum requires the return of spectrum to the public when an applicant relocates to a new advanced television authorization in the same community.

Relatedly, following <u>WPOW</u> in any comparative hearing context is plainly bad policy which presents a genuine threat of abuse of

RECEIVED
APR 2 6 1993
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Applications of	)	MM Docket No. 93-94
Scripps Howard Broadcasting Company	)	FCC File No. BRCT-910603KX
For Renewal of License of Station WMAR-TV, Baltimore, Maryland	)	
and	)	
Four Jacks Broadcasting, Inc.	)	FCC File No. BPCT-910903KE
For a Construction Permit For a New Television Facility on Channel 2 in Baltimore, Maryland	)	

TO: The Honorable Richard L. Sippel
Administrative Law Judge

CONSOLIDATED REPLY TO OPPOSITIONS

Scripps Howard Broadcasting Company ("Scripps Howard"), through counsel, hereby replies to the Opposition of Four Jacks Broadcasting, Inc. ("Four Jacks") filed April 15, 1993, and the Opposition of the Mass Media Bureau ("Bureau") filed April 19, 1993, in response to Scripps Howard's Petition for Certification ("Petition") filed April 8, 1993. Scripps Howard's interlocutory pleading seeks the dismissal of Four Jacks' application by the Commission, and thus Scripps Howard offers this reply pursuant to Section 1.294(c)(3) of the Commission's rules, 47 C.F.R. § 1.294(c)(3) (1992).

PROCEDURAL REPLY

Scripps Howard attached a draft "Application for Review" to its Petition to serve as a guide to how the two questions raised therein might be presented to the Commission upon the grant of certification. Contrary to Four Jacks' concern, the draft "Application for Review" was not presented as a final version of the document, and it will be amended upon grant of certification both to conform with any procedural directions of the certification order and to present the relevant issues to the Commission as succinctly as possible. Four Jacks and the Bureau would, of course, enjoy the opportunity to respond to this final version of the pleading whether it is certified for Commission review under Section 1.106 or Section 1.115(e)(3) of the rules.

SUBSTANTIVE REPLY

1. Four Jacks misstates the holding of *Wabash Valley* which is controlling here.

Four Jacks misstates the Commission's controlling holding in the Wabash Valley Broadcasting Corp. decisions, 18 Rad. Reg. (P&F) 559 and 18 Rad. Reg. 562 (1959). The Commission there expressly relied on its determination that Wabash's application was not one for new facilities but was "an application for change in facilities and hence, if granted, would serve to vacate any grant [of the renewal application]. Wabash's two applications are not therefore 'inconsistent or conflicting' within the meaning of [Section 73.3518] of the Rules." Wabash Valley Broadcasting Corp., 18 Rad. Reg. 562, 568 (1959) (emphasis added). Scripps Howard's "central theme" is simply a paraphrase of this holding.

This same Commission language directly contradicts Four Jacks' claim that the Wabash Valley Commission addressed and permitted as consistent applications the Wabash renewal application "and an application for a new facility." Opposition at ¶ 8 (emphasis added). It was only by treating the application as one for "change in facilities" that the Commission concluded it was not "per se" inconsistent or conflicting." 18 Rad. Reg. (P&F) 559, 562.

2. The WPOW, Inc. decision does not apply in the comparative renewal context.

   a. WPOW, Inc. does not apply here because it addressed the inconsistency of a different type of application.

Four Jacks' and the Bureau's reliance on WPOW, Inc., 66 Rad. Reg. 2d (P&F) 81 (1986) (as well as Four Jacks' reliance on Atlantic Radio Communications, Inc., 6 F.C.C.R. 4716 (MM Bur. 1991)), is misplaced because in these cases there was no pending inconsistent renewal application. These cases involved instead an assignment application and the proposed application for new facilities. In addition, contrary to Four Jacks' unsupported assertion that the pendency of its principals' renewal application was merely "fortuitous," Opposition at ¶ 5, such an inconsistent renewal application will, absent extraordinary events, always be pending during the time that a renewal applicant would have the opportunity under the rules to challenge the simultaneously filed renewal application of another Commission licensee for a different frequency in the same service and in the same market. See 47 C.F.R. § 73.1020. The inconsistent application rule thus always serves as a useful deterrent to the waste of Commission resources that would result from the processing of an application which could not, at filing, be granted.

Even if this distinction standing alone is not deemed sufficient to demonstrate that WPOW's policy shift does not apply to the present case, it graphically demonstrates that the current controversy involves a different context where the distinct issues which are presented should be addressed in the first instance by the Commission, not its staff.

b. WPOW does not apply in the circumstances of a comparative renewal challenge because the Commission applies separate procedural and substantive standards in this context.

In WPOW, the Commission confronted a situation involving an applicant competing for an unoccupied frequency, not a challenge to the renewal application of a competitor who was already providing service to the public in the local market. See 66 Rad. Reg. 2d at 81. The policy change adopted in WPOW should be limited to its context.

The Commission generally addresses the procedural and substantive issues in the comparative renewal context distinctly from those applicable in proceedings involving solely applications for new facilities. For example, the ongoing Commission review of whether to continue applying the bedrock "integration" criterion and how to weigh almost all of the other comparative standards is being conducted in a proceeding that expressly will not directly affect the comparative renewal standards where the renewal expectancy applies. See Reexamination of the Policy Statement on Comparative Broadcast Hearings, 7 F.C.C.R. 2664 at n.1 (1992). See also, Formulation of Policies and Rules Relating to Participants to the Comparative Renewal Process and Abuses of the Renewal Process, 3 F.C.C.R. 5179, 5187 (1988) (addressing solely renewal process abuses).

Given the separate treatment that has been accorded to the applicability of policies affecting proceedings in these two distinct contexts, it is unwarranted to presume that a change adopted with respect to an applicant for an unassigned frequency was intended to apply to applicants pursuing renewal challenges. This is particularly so in light of the distinct adverse effects on the integrity of the comparative renewal process that are discussed below.

c. Specific adverse effects to the public interest that are unique to the comparative renewal process would occur from applying WPOW's reasoning on behalf of renewal challengers.

In the context of applications for a new frequency, the incentive of being able to sell its existing authorization might encourage a licensee to initiate such a proceeding for a new service to the community. This small public interest rationale is wholly lacking, however, for a renewal challenge. No public interest benefit would accrue from applying WPOW in this context.

On the other hand, some of the adverse policy consequences specific to comparative renewal proceedings are easily identified in the draft "Application for Review." For example, upon the challenger's success, the community would lose an established qualified voice selected either by a comparative hearing or by undistorted market factors as well as face the risk of gaining only a weak, minimally qualified new voice, hand-picked by its competitor. See "Application for Review at 14-17. Stated differently, unlike the situation in a proceeding for an as yet unoccupied channel, where the incumbent licensee may itself be initiating a proceeding that will result in a new service to the community, there can be no net gain in the number of services available to the public from a successful comparative renewal challenge. Also, under the WPOW policy, the perverse economic incentives for the potential renewal challenger are much greater than those for the applicant for an unoccupied channel. The successful challenger could eliminate an existing strong competitor as well as insert a weak successor/competitor into the market.

d. The Commission has recognized that policy shifts adopted in adjudicatory decisions should not be applied by the staff in separate contexts.

When an adjudicated decision is applied beyond its context, the Commission cannot have considered all the relevant factors. The Commission accordingly has recognized that an adjudication is not an appropriate vehicle to implement a change in policy beyond the particular circumstances presented in the adjudication. See Syracuse Peace Council, 2 F.C.C.R. 5043 (1987), recon. denied, 3 F.C.C.R. 2035, aff'd, 65 Rad. Reg. 2d (P&F) 1759, aff'd 867 F.2d 654 (D.C. Cir. 1989),

In Syracuse the Commission fully intended that its intensely considered decision would eliminate the fairness doctrine entirely in the general context, id. at 5047-48, and it took care to point out that the decision would serve as precedent in other contexts, id. at n.75. The Commission advised the staff, however, to continue processing fairness doctrine complaints arising in contexts that were not "clearly within the scope of" the general decision such as "ballot issues" questions, until the Commission itself could make an appropriate determination on the scope of its precedent. See Letter from FCC Chairman Dennis Patrick to Chairman Dingell, September 22, 1982 (copy attached as Exhibit A). The Commission's narrow application of its exhaustively analyzed, 28-page decision in Syracuse (accompanied by a 32-page report on the lack of any viable fairness doctrine enforcement alternative, see 2 F.C.C.R. 5272-5304 (1987), recon. denied, 3 F.C.C.R. 2050) contrasts starkly with Four Jacks' and the Bureau's sweeping assessment of the automatic applicability--in a different context, with different policy consequences--of the Commission's one and one-half page and apparently unappealed decision in WPOW.

e. Adopting a limited view of an adjudication-effected policy change is required by the axiom of administrative law that an agency must offer a rational explanation for effecting a change in policy.

The courts have repeatedly reminded the Commission that it cannot depart from preexisting policies absent the agency's consideration of all the applicable factors and the presentation of a reasoned explanation as to how the change will affirmatively serve the public interest. See, e.g., Office of Communications

[illegible]

indication in WPOW that comparative renewal proceedings would be

affected by the decision, and the adverse consequences to the

WPOW, 66 Rad. Reg. 2d at 82. The Commission, however, just as in Southern Keswick, recognized that the value of the abandoned spectrum requires its return to the public, not its sale for the private benefit of the current licensee. Id. This recent reinvigoration of the underlying policy rationale of Southern Keswick at a minimum raises a "substantial doubt" and "substantial ground for difference of opinion" about the controlling question of law presented here: whether WPOW's policy should be extended to the comparative renewal context.

Separately, in the King City, California Amendment of the Table of Allotments proceeding, 1 F.C.C.R. 976 (1986), the Commission's staff declined to extend WPOW's reasoning to the context of petitions for rulemaking to allot an improved channel to a market. The staff held that WPOW applies only in the context of applications for new facilities "for an allotted channel," ignoring the fact that the WPOW test of "technical consistency" was met by the requestor. Id.

4. WPOW is plainly bad policy which warrants narrow limitation because relevant factors were not considered and because its application would require that the Commission's processes be used for a result that structural, non-applicant specific factors suggest would be counter to the public interest.

use of scarce public resources for the effecting of an exclusively private and potentially anti-competitive benefit. The adverse effects on market-wide competition are apparent from a simple analysis of the incentives presented to the successful licensee/competing applicant.[1] Because significant harm to the public interest predictably may flow from the "structural" effects of this policy's application, the WPOW policy will not be able to withstand judicial review.

No significant public interest rationale can be offered in WPOW's defense. The Commission's rationale for WPOW expressly was to avoid perceived inconsistency with two other policies, but these policies either (1) did not present the same anticompetitive danger at all (selling a station in another market or another service); or (2) did not involve the use of the expensive comparative hearing processes which can be justified only if the result will be to select the best predictable voices for the entire market ("trade-ups"). The public interest benefit that the comparative hearing for the new frequency presumably would select the best applicant between the licensee challenger and the other applicants is not a relevant factor in whether to apply WPOW or not, because declining to apply WPOW would not in any way limit that challenge from occurring.

---

[1] See the Commission's defense of preferring the use of more objective and reliable non-applicant specific "structural" decision making criteria in Anchor Broadcasting Limited Partnership, 72 Rad. Reg. 2d (P&F) 98, 100 (1993).

Finally, that a licensee-selected "competitor" may not in fact offer any competition in the market may be seen from perusal of the Commission record related to the 1991 assignment of Pittsburgh Station WPTT-TV. See FCC Letter to Martin R. Leader, June 21, 1991 (copy attached as Exhibit B). There, an incumbent licensee bought a competing television station in the market in a "trade-down" to a station on a higher UHF channel that was nevertheless being operated much more successfully. Id. at 2. The incumbent licensee purchaser divested its existing station to one of its employees "at extremely favorable terms" on the ground that this would inter alia encourage minority ownership. Id. at 4. The assignment package specified that the assigned station would offer Home Shopping Network programming, but the staff expressly found that programming control of WPTT was not part of the sales agreement. Id. at 2, 5. After the staff inquired about some other provisions in the assignment agreement that did appear to go too far toward limiting however, to question whether expensive Commission comparative hearing resources should be utilized to permit a possible reoccurrence of such a decrease in competition in the Baltimore market. This is a matter of policy that the Commission should be permitted the opportunity to address now.

CONCLUSION

Four Jacks' denial of the applicability of the Wabash Valley decision misstates that decision's clear holding, and the policy expressed in the WPOW decision should not be extended to the comparative renewal context before the Commission has an opportunity to consider the serious adverse consequences to its processes flowing therefrom. Scripps Howard has shown that both "substantial doubt" and "substantial ground for difference of opinion" exist with respect to the staff's erroneous policy decision. Proper resolution of the issue would eliminate the need for this hearing, and therefore review by the Commission at this time is both appropriate and required.

Respectfully submitted,

SCRIPPS HOWARD BROADCASTING COMPANY

By: ______________________
Kenneth C. Howard, Jr.
David N. Roberts

BAKER & HOSTETLER
1050 Connecticut Avenue, N.W.
Suite 1100
Washington, DC 20036
(202) 861-1500

April 26, 1993

Counsel to Scripps Howard Broadcasting Company

EXHIBIT A

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

September 22, 1987

OFFICE OF
CHAIRMAN

The Honorable John D. Dingell
Chairman, Committee on Energy and Commerce
Room 2125, Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Dingell:

This letter responds to your inquiry of September 14, 1987, regarding the scope of the Commission's recent ruling on the fairness doctrine in the Meredith remand. In re Complaint of Syracuse Peace Council against Television Station WTVH, Syracuse, New York, FCC 87-266 (rel. Aug. 6, 1987). Specifically, you have asked the following questions:

> (1) What did the Commission decide on August 4 regarding enforcement of the political editorial rule, the personal attack rule, the Zapple doctrine, and the application of the fairness doctrine to ballot issues?

The Commission's August 4, 1987 ruling related only to its fairness doctrine policy. This ruling did not affect any obligations codified by the Congress, such as the equal opportunity provisions under § 315 or the reasonable access provisions of § 312 (a) (7).

The Commission's ruling on the enforcement of the fairness doctrine occurred in the context of a particular adjudication. In that proceeding, the Syracuse Peace Council had complained that Meredith Corporation's Station WTVH, Syracuse, New York, had violated the doctrine by failing reasonably to provide contrasting viewpoints to certain editorial advertisements that WTVH had aired which advocated the construction of a nuclear power plant. Although the Commission had initially determined that Meredith had indeed violated the doctrine, it was later ordered to consider Meredith's argument in its defense that enforcement of the doctrine was unconstitutional.

In ruling on Meredith's constitutional arguments in its defense, the Commission specifically discussed the scope of its decision. First, the Commission concluded that there was nothing in the manner in which it enforced the doctrine in the Meredith case that would allow it to limit its decision to the constitutionality of the doctrine as applied to Meredith. Second, the Commission determined that its enforcement of the Cullman doctrine in this case, which governed the broadcast of editorial advertisements, was simply the application of general fairness doctrine obligations to a particular factual setting. It concluded, therefore, that its decision could not be limited to the constitutionality of the Cullman doctrine alone, but rather had to address the general fairness doctrine.

Finally, the Commission specifically stated that because the case before it did not involve every aspect of the doctrine, "we need

The Commission is seeking public comment on the petitions for reconsideration and the petition for clarification. After full consideration of these comments, the Commisison will (1) resolve the petitions for reconsideration and (2) clarify the impact of the Meredith decision on rules and policies associated with the fairness doctrine.

> (3) What instructions have been provided to staff regarding enforcement of the fairness doctrine, including the rules cited above? What is the status of pending complaints regarding violations of these rules? If a complaint is received by the Commission alleging a violation of these rules, would the Commission accept the complaint, investigate the alleged violation, and act on it if the complaint is justified?

a. Instructions on Enforcement

The Meredith decision remains this agency's most recent precedent on the enforcement of the fairness doctrine. Until such time as the Commission makes a formal determination as to the scope of Meredith beyond general fairness doctrine cases, the Commission will continue to accept, investigate and act upon complaints on matters that do not clearly fall within the scope of the Meredith decision, including personal attack, political editorializing, Zapple and ballot issues cases.

It is worth noting, however, that a broadcaster subject to investigation might cite in its defense the Meredith decision, arguing that, because of the similarities between the general fairness doctrine and the particular rule at issue in its proceeding, the Meredith decision serves as precedent for the conclusion that the particular rule is unconstitutional. If that argument were made, then the Commission would have to decide the precedential applicability of the Meredith decision to the particular rule at issue in that proceeding. Should the Commission be forced to rule on a case before acting upon the petition for clarification, it would, of course, take into consideration all comments filed in response to the above-noted petitions.

b. Status of Pending Complaints

There are currently 27 complaints pending before the Commission that have alleged violations of Commission rules in the fairness doctrine area. These complaints are in various stages of the review process, but, based on an initial review, it appears that some allege violations of the personal attack and political editorializing rules, as well as other Commission policies related to the fairness doctrine that may not be clearly within the scope of the <u>Meredith</u> decision.

<u>c. Action on Complaints</u>

Although no complaints pending at the time of the <u>Meredith</u> decision have been dismissed as of this date, the staff will be instructed to dismiss both pending and newly filed complaints that involve the <u>Cullman</u> doctrine and other general fairness doctrine obligations that are clearly within the scope of the <u>Meredith</u> decision. In each case, however, the complainant will be informed that the <u>Meredith</u> decision is subject to reconsideration and judicial appeal and that, if the Commission changes its conclusion with respect to the enforcement of the fairness doctrine on reconsideration or is reversed on appeal, the complainant will be free to refile the complaint. The staff is already responding to telephone inquiries in a similar manner.

Until further instruction, the staff has been instructed to accept, investigate and resolve complaints that present prima facie violations of rules that are not clearly within the scope of the <u>Meredith</u> decision (<u>e.g.</u>, personal attack, political editorializing) as described above in Section (3) (a).

I hope that this information will be helpful to you and the Committee in understanding the current status of the Commission's programming rules that are or may be related to the fairness doctrine.

EXHIBIT B

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

IN REPLY REFER TO:
8940-DEB

Martin R. Leader, Esq.
Fisher, Wayland, Cooper and Leader
1225 Twenty-Third Street, N.W.
Washington, D.C. 20037-1125

Dear Mr. Leader:

This refers to the pending applications for Commission consent to the assignment of licenses of Stations WPGH-TV (Channel 53) and WPTT-TV (Channel 22), both located in Pittsburgh, Pennsylvania. Commercial Radio Institute, Inc. (CRI) is currently the licensee of Station WPTT-TV. It proposes to sell this station to WPTT, Inc. (BALCT-910117KF) for seven million dollars. CRI's parent, Sinclair Broadcast Group, Inc. (SBG), then proposes to purchase Station WPGH-TV from Channel 53 Licensee, Inc. (BALCT-910118KE) for fifty-five million dollars. Since Section 73.3555(a)(3) of the Commission's Rules prohibits the ownership of more than one television station in a market, CRI/SBG must dispose of its attributable interests in Channel 22 prior to acquiring an attributable interest in Channel 53.

Both applications are subject to petitions to deny filed on behalf of Mark I. Baseman (petitioner or Baseman), who lives in the Pittsburgh area. In assessing the merits of a petition to deny, the Commission is guided by Section 309(d)(1) and (2) of the Communications Act, as analyzed in Astroline Communications Co. v. F.C.C., 857 F.2d 1556 (D.C. Cir 1988). First, the Commission determines whether the petitioner has made specific allegations of fact that, if true, would demonstrate that grant of the application would be *prima facie* inconsistent with the public interest. If so, then the Commission proceeds to examine and weigh all of the material before it, including information provided by the applicants, to determine whether there is a substantial and material question of fact requiring resolution in a hearing. Finally, the Commission must determine whether grant or denial of the application would serve the public interest.

Background The President, Treasurer, Director and 100% voting shareholder of WPTT, Inc. is Edwin L. Edwards, Sr., the current WPTT-TV Station Manager and Community Affairs Director. Edwards is an African-American. [1] Assignee proposes to operate Station WPTT-TV as a Home Shopping Network affiliate. WPTT, Inc. will execute a one million dollar "Convertible Subordinate Debenture" (debenture) and a six million dollar "Term Note." The debenture is at 8.5%, interest only, and is due in the year 2014. The debenture permits CRI to convert its interest, subject to Commission approval, into 80% of WPTT,

---

[1] CRI has requested a tax certificate pursuant to the Commission's policy on Minority Ownership of Broadcasting Facilities, 68 FCC2d 979 (1978). We will issue the tax certificate separately.

Inc.'s equity. The Term Note provides for interest-only payments for the first ten years. Principal payments are to be paid in years eleven to fifteen. The Term Note is secured by a "Security Agreement" and a "Stock Pledge Agreement." In addition the agreement between CRI and WPTT,Inc. requires that Edwards enter into an "Employment Agreement" with WPTT, Inc. As originally filed, the application did not contain copies of the Term Note, Security Agreement or Employment Agreement.

<u>The Pleadings</u> Baseman's main concern with the Channel 22 assignment [2] is the extent of control that CRI and its owners will have over Station WPTT-TV after consummation of the sale. First, Baseman notes that CRI/WPTT, Inc. failed to provide a copy of the Term Note with the application. Petitioner believes that the Commission should scrutinize the terms of the Term note, to ascertain the extent to which CRI might be attempting to retain a reversionary interest in WPTT-TV through the default terms in the note. Second, Baseman argues that the debenture provision giving CRI the right to convert its interest into eighty percent of WPTT, Inc.'s voting stock, coupled with the Term Note violates the Commission's multiple-ownership rule, Section 73.3555(a)(3), because CRI will have attributable interests in two television stations in the same market. Moreover, Baseman contends that the relationships created by these agreements would violate the cross-interest policy because CRI would have a meaningful relationship in a competing station in the same market. Petitioner concludes that CRI is retaining interests which will provide it with substantial control over WPTT-TV and its licensee and that such interests ensure that Channel 22 (operated as a Home Shopping Network affiliate) will remain noncompetitive with Station WPGH-TV.

In response, CRI denies that the WPTT-TV transaction violates the multiple-ownership rule, the cross-interest policy or the reversionary rule (Section 73.1150 of the Commission's rules). Moreover, CRI states that WPTT-TV has never been a serious competitor with WPGH-TV because WPTT-TV has consistently been last among Pittsburgh's over-the-air stations and even lags behind three different cable channels in terms of market share.

<u>Staff Inquiries</u> On April 22, 1991, in response to a request by the staff, CRI provided copies of the Security Agreement and Stock Pledge Agreement. On May 10, 1991, the staff wrote the applicants and raised several matters concerning